

Law Office of Jack Silver

P.O. Box 5469 Santa Rosa, California 95402
Phone 707-528-8175 Fax 707-528-8675
lhm28843@sbcglobal.net



Via Certified Mail – Return Receipt Requested

January 3, 2013

Thomas R. Parker, County Counsel
County of Mendocino
501 Low Gap Road, Rm. 1030
Ukiah, CA 95482

Carmel J. Angelo, Chief Executive Officer
Mendocino County Board of Supervisors
501 Low Gap Road, Rm. 1010
Ukiah, CA 95482

Re: Notice of Violations and Intent to File Suit Under the Clean Water Act

Dear Counsel and Chief Executive Officer:

NOTICE

The Clean Water Act (“CWA” or the “Act”) §505(b), 33 U.S.C. §1365(b), requires that sixty (60) days prior to the initiation of a civil action under CWA §505(a), 33 U.S.C. §1365(a), a citizen must give notice of intent to sue to the alleged violator, the Environmental Protection Agency (“EPA”) and the State in which the alleged violations occur.

Northern California River Watch (“River Watch”) hereby places the County of Mendocino (“County”) on notice that following the expiration of sixty (60) days from the date of this Notice, River Watch intends to bring suit in the United States District Court against the County for continuing violations of an effluent standard or limitation, permit condition or requirement, a Federal or State Order or Plan issued under the CWA, in particular, but not limited to CWA §505(a)(1), 33 U.S.C. §1365(a)(1), the Code of Federal Regulations, and the North Coast Regional Water Quality Control Board’s Water Quality Control Plan (“Basin Plan”).

The CWA regulates the discharge of pollutants into navigable waters, including the discharge of pollutants through stormwater. The statute is structured in such a way that all discharges of pollutants are prohibited with the exception of enumerated statutory provisions. One such exception authorizes a polluter, who has been issued a permit pursuant to CWA §402, 33 U.S.C. §1342, to discharge designated pollutants at certain levels subject to certain conditions. The effluent discharge standards and limitations specified in a National Pollution Discharge Elimination System ("NPDES") Permit define the scope of the authorized exception to the 33 U.S.C. §1311(a) prohibition, such that the violation of a permit limit places a polluter in violation of 33 U.S.C. §1311(a), and thus in violation of the CWA. Private parties may bring citizens' suits pursuant to 33 U.S.C. §1365 to enforce effluent standards or limitations, including violations of 33 U.S.C. §1311(a), 33 U.S.C. §1342(p), and 33 U.S.C. §1365(f)(1).

The CWA provides that authority to administer the NPDES permitting system in any given state or region can be delegated by the EPA to a state or regional regulatory agency, provided that the applicable state or regional regulatory scheme under which the agency operates satisfies certain criteria. *See* 33 U.S.C. §1342(b). In California, the EPA has granted authorization to a state regulatory apparatus comprised of the State Water Resources Control Board and several subsidiary Regional Water Quality Control Boards to issue NPDES permits. The entity responsible for issuing NPDES permits, including municipal stormwater permits, and otherwise regulating discharges in the region at issue in this Notice is the North Coast Regional Water Quality Control Board ("RWQCB").

The CWA requires that any notice regarding an alleged violation of an effluent standard or limitation, or of an order with respect thereto, shall include sufficient information to permit the recipient to identify the following:

1. *The specific standard, limitation, or order alleged to have been violated.*

To comply with this requirement River Watch has identified violations of the County's Storm Water Management Program ("SWMP") in violation of the NPDES permit requirements for municipal stormwater discharges - CWA §402(p), 33 U.S.C. §1342(p).

2. *The activity alleged to constitute a violation.*

River Watch has set forth narratives below describing the violations of the County's SWMP and describing with particularity specific incidents referenced in the RWQCB's public documents relating to the County, and incorporates by reference records cited below from which descriptions of specific incidents were obtained.

3. *The person or persons responsible for the alleged violation.*

The entity responsible for the alleged violations identified in this Notice is the County of Mendocino and those of its employees responsible for compliance with its SWMP adopted on September 6, 2005.

4. *The location of the alleged violation.*

The location of the various violations are identified in records created and/or maintained by the County and by the RWQCB which relate to the County's SWMP as further described in this Notice.

5. *The date or dates of violation or a reasonable range of dates during which the alleged violation occurred.*

River Watch has examined records maintained by the RWQCB from December 4, 2007 through December 4, 2012. The range of dates covered by this Notice is December 4, 2007 to December 4, 2012. River Watch will from time to time update this Notice to include all violations which occur after the range of dates currently covered. Some violations are continuous and therefore each day constitutes a violation.

6. *The full name, address, and telephone number of the person giving notice.*

The full name of the person giving notice is Northern California River Watch, referred to in this notice as "River Watch." River Watch is a non-profit corporation dedicated to the protection and enhancement of the waters of the State of California including all rivers, creeks, streams, and groundwater in Northern California. River Watch is organized under the laws of the State of California, and located in Sebastopol, California. River Watch may be contacted via email: US@ncriverwatch.org, or through its attorneys.

River Watch has retained legal counsel with respect to the issues set forth in this Notice. All communications should be addressed to:

Law Office of Jack Silver
Jerry Bernhaut, Esq.
P.O. Box 5469
Santa Rosa, CA 95402-5469
Tel. 707 528-8175
Fax. 707 528-8675
Email: lhm28843@sbcglobal.net

BACKGROUND AND VIOLATIONS

River Watch alleges the County has violated the CWA, the Basin Plan, and the Code of Federal Regulations by virtue of violations of the *National Pollutant Discharge Elimination System (NPDES) General Permit No. CAS000004, Water Quality Order No. 2003-005-DW, Waste Discharge Requirements (WDRs) for Stormwater Discharges from Small Municipal Separate Storm Sewer Systems* ("General Permit") and the County's SWMP. The violations identified below are supported by the records on file with the RWQCB. It is alleged that these violations are continuing.

The County is a municipal discharger under CWA §402(p) and as such must operate under a municipal stormwater permit - CWA §402(p)(3)(B), 33 U.S.C. §1342(p)(3)(B). The County's operations are located within the watershed basin of the Russian River, a water of the United States. The County provides stormwater management for urbanized, unincorporated areas in Mendocino County. The County was notified of its designation as a Municipal Separate Stormwater Sewer System (MS4) in 2003. Designation as an MS4 required the County to develop and implement a SWMP to reduce the contamination of stormwater runoff and prohibit illicit discharges. The County completed and adopted its Second Revised SWMP on September 6, 2005.

As an MS4, the County is required to comply with the General Permit which "prohibits the discharge of materials other than stormwater that are not 'authorized non-stormwater discharges.'" *SWRCB Water Quality Order NO. 2003-0005-DWQ § D.2.c*. The General Permit also incorporates discharge prohibitions contained in the Basin Plan. In addition, the General Permit requires the County to develop a SWMP which includes six (6) minimum control measures:

- Public Education and Outreach;
- Public Participation/Involvement;
- Illicit Discharge Detection and Elimination;
- Construction Site Runoff Control;
- Post-Construction Runoff Control; and,
- Pollution Prevention/Good Housekeeping.

The County must implement its SWMP using appropriate stormwater management controls, or best management practices ("BMPs"). The County must also develop measurable goals for the SWMP and evaluate the effectiveness of the SWMP through an annual report.

The EPA has published BMPs for the above-defined minimum control measures. The BMP for Public Education and Outreach requires MS4s to inform individual and households as to ways in which to reduce stormwater pollution. The Public Involvement BMP requires MS4s to involve the public in the development, implementation, and review of the SWMP. The Illicit Discharge Detection and Elimination BMP includes identifying and eliminating illicit discharges and spills to storm drain systems. The Construction Site Runoff Control BMP states that MS4s and construction site operators must address stormwater runoff from active construction sites. The Post-Construction Site Runoff Control BMP requires MS4s, developers, and property owners to address stormwater runoff after the completion of construction activities. Lastly, the Pollution Prevention/Good Housekeeping BMP compels MS4s to address stormwater runoff from their own facilities and activities.

River Watch contends the County is in violation of four (4) of the six (6) minimum control measures as follows:

1. The County violated the Illicit Discharge Detection and Elimination Control Measure by failing to complete a map of all outfalls identifying the names of all waters of the United States that receive discharges from those outfalls, and by failing to annually inspect the County storm drain system.
2. The County has yet to develop or implement procedures for construction site plan review, and procedures for inspection and enforcement of control measures, in violation of the Construction Site Stormwater Runoff Control Measure.
3. The County violated the Post-Construction Runoff measure by failing to develop, implement, and enforce a program to address stormwater runoff from new and redevelopment, as well as failing to provide a process to ensure long-term operation and maintenance of BMPs.
4. The County has failed to create policies and procedures for maintenance of County facilities, vehicles, and equipment and has failed to conduct annual sweeping of County-managed, paved parking and operating areas.

The County's violations of the General Permit and its SWMP threaten the beneficial uses of the Russian River and its tributaries. According to the Basin Plan, beneficial uses of the Upper Russian River Basin include municipal and domestic supply; agricultural supply; groundwater recharge; freshwater replenishment; water contact recreation; commercial and sport fishing; warm and cold freshwater habitat; wildlife habitat; and rare, threatened, and endangered species habitat.

Currently, all major waterbodies in the County of Mendocino are listed as impaired on the State of California's 303(d) List of Water Quality Limited Segments. The Mendocino County portion of the Russian River is listed as impaired as a result of sedimentation/siltation and temperature. Sedimentation/Siltation is caused in part by agriculture, bridge construction, channel erosion, construction and land development, erosion/siltation, habitat modification, and stream bank modification/destabilization. Increased temperatures result from flow non-point source runoff, regulation/modification, habitat modification, and stream bank modification/destabilization. The Russian River is habitat for Coho salmon and Steelhead trout, both of which are listed as threatened under the ESA. Higher temperatures in the Russian River may be a source of impairment of these cold water fisheries.

The current deficiencies in the County's implementation of the General Permit and the County's SWMP can cause further impairment of the Russian River for both sedimentation/siltation and increased temperatures, and are alleged to have further degraded the Russian River. The County has no current procedures in place for construction site review or for the inspection and enforcement of control measures. More strict control over construction and land development by the County could decrease the sedimentation/siltation of the Russian River.

REMEDIAL MEASURES REQUESTED

A. ILLICIT DISCHARGE DETECTION AND ELIMINATION

1. Completion of a map of all outfalls to include the identification by name of all waters of the United States that receive discharges from the County's stormwater drain system.
2. Annual dry-weather inspection of the County's stormwater drain system.

B. CONSTRUCTION SITE STORMWATER RUNOFF CONTROL

1. Development and implementation of procedures for construction site plan review.
2. Development and implementation of procedures for inspection and enforcement of control measures.

C. POST-CONSTRUCTION STORMWATER RUNOFF MANAGEMENT

1. Development, implementation and enforcement of a program to address stormwater runoff from new development and redevelopment.
2. Provision of a process to ensure long-term operation and maintenance of all BMPs.

D. POLLUTION PREVENTION/GOOD HOUSEKEEPING

1. Implementation of policies and procedures for the maintenance of County facilities, vehicles and equipment.
2. Establishment of annual staff training for all staff who may be involved with the County's SWMP, County facilities, vehicles, and equipment.

E. PUBLIC PARTICIPATION/INVOLVEMENT

1. Updating and enhancement of the County's stormwater website to include more information as to how to report sewer system overflows, information on how to prevent stormwater runoff at construction and post-construction sites, and copies of the County's SWMP and BMPs.
2. Opening of all stormwater meetings to the public with at least one week's notice posted on the County's website before the meeting occurs.

CONCLUSION

The violations set forth in this Notice effect the health and enjoyment of members of River Watch who reside and recreate in the affected community. The members of River Watch use the affected watershed for domestic water supply, agricultural water supply, recreation, sports, fishing, swimming, shell fish harvesting, hiking, photography, nature walks and the like. Their health, use and enjoyment of this natural resource is specifically impaired by the County's violations of the CWA as set forth in this Notice.

River Watch believes this Notice sufficiently states grounds for filing suit. At the close of the 60-day notice period or shortly thereafter River Watch intends to file a citizen's suit under CWA § 505(a) against the County for the violations identified in this Notice.

During the 60-day notice period, River Watch is willing to discuss effective remedies for these violations. If the County wishes to pursue such discussions, it is suggested that a dialog be initiated promptly. River Watch does not intend to delay the filing of a lawsuit if discussions are continuing when the notice period ends.

Very truly yours,



Jerry Bernhaut

JB:lhbm

cc: Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N. W.
Washington, D.C. 20460

✓ Regional Administrator
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, California 95812